Ingham Regional Medical Center *and* Local 459, Office and Professional Employees International Union, AFL–CIO. Cases 7–CA–46380 and 7–CA–46549

September 24, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On April 7, 2004, Administrative Law Judge Jane Vandeventer issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. September 24, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The judge found that the Union waived its right to bargain about the decision to subcontract the coding work by virtue of language in the parties' collective-bargaining agreement. In so finding, the judge applied the Board's "clear and unmistakable" waiver standard. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). In *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993), the D.C. Circuit set forth a "contract coverage" analysis, finding appropriate that analysis rather than a "clear and unmistakable" waiver analysis, where the contract covers the issue in dispute. We find it unnecessary to pass on which standard is appropriate, because the Respondent would have no obligation to bargain with the Union about the decision to subcontract the coding work under either standard. Further, we observe that no party has excepted to the judge's finding that the "clear and unmistakable" waiver analysis is applicable in this case.

Richard F. Czubaj, Esq., for the General Counsel.
Rozlyn E. Kelly, Esq., for the Respondent.
Cynthia Jeffries, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on January 28, 2004, in Lansing, Michigan. The complaint alleges that Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide information to the Charging Party Union, which information is necessary to carry out the Union's bargaining obligation. The complaint also alleges that Respondent violated Section 8(a)(5) by subcontracting bargaining unit work and laying off employees without notice to the Union nor opportunity for bargaining over the decision and its effects. The Respondent filed an answer denying the essential allegations in the complaint.[1] After the conclusion of the presentation of evidence, the parties presented oral arguments and later filed briefs, which I have considered.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Lansing, Michigan, where it is engaged in the operation of acute health care facilities. During a representative 1-year period, Respondent derived gross revenue in excess of $250,000 from the operation of said facilities, and during the same period, has purchased and received at its Lansing facilities, goods and materials valued in excess of $50,000 directly from points outside the State of Michigan. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

The Charging Party Union (Union) represents a unit of employees long recognized by Respondent. The bargaining unit was agreed at trial to be as described in the parties' current collective-bargaining agreement covering these employees, called the "Paraprofessional, Office and Skilled Trades Agreement." The collective-bargaining agreement was referred to at trial and will be referred to herein as the POST agreement. The current POST agreement covers approximately 700 employees and is effective by its terms from June 22, 2000, through September 30, 2004. It is undisputed that the employees engaged

[1] At the hearing, I granted the General Counsel's motion to amend the complaint by withdrawing one allegation of failure to provide information.

in the work of assigning numerical codes to various medical diagnoses, treatments, and procedures in patients' records for the purposes of proper billing (coding) were a part of the POST bargaining unit. These employees will be called coders.

The circumstance which gave rise to the controversy was a decision by Respondent to subcontract the work of the coders to a company called Providers Hospital Net Service (PHNS). It is undisputed that Respondent first notified the Union's representative, Cindy Jeffries, that it was contemplating such action on May 7, 2003.[2] Respondent told Jeffries that if the coding work were subcontracted, that it would be a corporatewide subcontract, not confined to Respondent's operations, which are covered by the POST agreement. It is further undisputed that Respondent notified the Union in writing on August 6 that it had decided to subcontract the coding work to PHNS, that the affected employees received layoff notices on September 30, and the layoff was effective on October 6.

The POST agreement contains pertinent language in Section 3: Management Rights and in Section 15: Subcontracting. Both sections are set forth below:

> Section 3: Management Rights
>
> *Section 3.1. Management's Reserved Rights.*
>
> (a) Except as expressly limited by the terms of this Agreement, the Employer retains and shall have the sole and exclusive right to manage and operate the Medical Center in all of its operations and activities. Among the rights of management, included only by way of illustration and not by way of limitation, is the right to determine all matters pertaining to the services to be furnished and the methods, procedure, means, equipment and machines required to provide such service; to determine the nature and number of facilities and departments to be operated and their location; to establish classification of work and the number of personnel required, to direct and control operations; to discontinue, combine or reorganize any part or all of its operations; to maintain order and efficiency; to make judgments as to the ability and skill of its employees; to continue and maintain its operations as in the past; to study and use improved methods and equipment; use outside assistance or engage independent contractors to perform any of the Employer's operations or phases thereof (subcontracting); and in all respects to carry out the ordinary and customary functions of management. All such rights are vested exclusively in the Employer and shall not be subject to arbitration procedure established in this Agreement.
>
> (b) The Employer shall also have the right to hire, promote, assign, transfer, suspend, discipline, discharge for just cause, layoff and recall personnel; to establish reasonable work ruled; to determine work loads; to establish and change work schedules; to provide and assign relief personnel; provided, however, that these rights shall not be exercised in violation of any specific provision of this Agreement and as such, they shall be subject to the Grievance and Arbitration Procedure established herein.
>
> (c) The Union hereby agrees that the Employer retains the sole and exclusive right to establish and administer without limitation, implied or otherwise, all matters not specifically and expressly limited by this Agreement.
>
> Section 15: Subcontracting
>
> *Section 15.1. Subcontracting, Affiliation and Mergers*. The Employer reserves the right to enter into affiliation and merger agreements and to subcontract work normally performed by bargaining unit employees. However, if such merger, affiliation, or subcontracting causes a layoff of bargaining unit employees, the Employer agrees to first discuss the decision and impact of the merger, affiliation or subcontracting and layoff with the Union and give sixty (60) days advance notice, or in lieu thereof, wages the laid-off employees would have earned during the sixty (60) day notice period but for the layoff.
>
> *Interpretive Statement*: The discussion of the decision and impact of the merger, affiliation or subcontracting, which causes a layoff of bargaining unit employees, shall occur prior to the Employer actually deciding whether or not to enter into such agreement or to subcontract the work. The parties shall meet to discuss ways that the work environment can be changed to prevent layoffs. The Union will be given at least a sixty (60) day period after that initial discussion to work with the Employer to illustrate that the work can be performed by bargaining unit employees within the employer's identified parameters. The Employer shall not give the sixty (60) day advance layoff notice, or in lieu thereof, wages the laid off employees would have earned but for the layoff, until the end of the initial sixty (60) day discussion period.

The "Interpretive Statement" was added to the collective-bargaining agreement during contract negotiations in 2000. It appears from the language in section 15, as well as from the testimony of witnesses, that two 60-day periods are contemplated. Under the contract's language, prior to any layoff, the Union is to be given notice 60 days in advance. An additional 60-day period *prior to* the notice period is prescribed for "discussions" between the parties.

Following Respondent's telephone call to the Union in early May, Cindy Jeffries and employee Pam Dragisic met with Respondent, including JoAnne Fredericks, corporate vice president for human resources, about the subcontracting on May 20. Fredericks informed the Union that Respondent was contemplating subcontracting the coders' work to PHNS, and that the current employees could go to work for PHNS and could do the work at their homes. The same day, the Union made a written request for information, such as many of the costs involved, the equipment to be used, and the expected savings to Respondent from subcontracting the work. A week later, on May 27, the Union submitted a two and a half page list of questions about the proposed subcontracting, including questions about the anticipated wages, hours, and working conditions of the coders should they become employees of PHNS.

In June, Respondent informed the Union that it did not know the answers to many of the questions involving PHNS, but set up a meeting for employees in order to try to answer some of

[2] All dates hereafter are in 2003, except where specifically noted.

the questions about employment conditions with the proposed subcontractor. Jeffries was not present at this informational meeting for employees. Employee Pam Dragisic testified that certain of the employees' questions concerning benefits and working conditions at PHNS were not answered at this meeting.

On June 27, the Union again met with Respondent about the issue. Respondent presented some cost figures to the Union at that time, including cost savings which it expected to realize assuming that the coding work were to be subcontracted. On the same date, the Union presented a grievance concerning the subcontracting issue, claiming that Respondent had made the decision to subcontract without giving the Union the required 60-day notice, as called for in the contract, and that it made the decision without properly bargaining with the Union. Three days later, on June 30, the Union made another information request to Respondent in writing. The June 30 request reiterated requests for wages and working conditions, which would apply to employees of PHNS if the work were subcontracted.

Jeffries testified the Union also notified Respondent that it was available for bargaining, and suggested three dates in July. Fredericks was on vacation during July, but her subordinate, Linda Gardner, responded in writing to the Union's grievance on July 3, taking the position that the decision regarding subcontracting had not yet been made, that Respondent had supplied all information necessary for the parties to discuss the issue as contemplated in the collective-bargaining agreement, and setting forth the three "parameters" Respondent had identified and was going to use to make the subcontracting decision. The three parameters were:

- "The total expense of operating the coding function at IRMC must be reduced by at least $90,000.00 in fiscal year 2004. In future years, we expect the cost to decrease further.
- The employees must be prepared to work off-site, eventually, freeing prime hospital space for clinical functions. They will be placed either in a non-hospital setting (such as the old BCN building on S. Cedar) or at home.
- The expense associated with equipping coders to work from their homes must be included in cost projections for [FY] 2005 and beyond."

The parties did not meet again concerning the subcontracting issue. Jeffries testified that the Union did not make a proposal to Respondent to retain the work in-house because it needed the requested information in order to formulate such a proposal. Jeffries testified that the "parameters" identified by Respondent were not sufficient. Jeffries further testified that although the Union and the employees did come up with a few cost-saving ideas internally, the Union did not divulge these ideas to Respondent.

Joanne Fredericks testified that Respondent believed and had consistently behaved in conformity with the position that it had the right to make the decision to subcontract. Respondent believed that the only constraints upon it were the requirement that it notify the Union 60 days in advance of any subcontracting that would involve layoffs of employees, and that it discuss with the Union its reasons for subcontracting and consider any proposals by the Union which would address those reasons.

B. Discussion and Analysis

1. Bargaining

The General Counsel takes the position that Respondent's decision to subcontract the work of the coders was a mandatory subject of bargaining which was not waived by contract, and that Respondent therefore had an obligation to provide the Union with information which would enable it to bargain about the decision to subcontract as well as the effects of such a decision. The General Counsel contends that the language of the collective-bargaining agreement does not clearly establish a waiver of the Union's right to bargain about subcontracting, largely on the ground that the words "bargain" and "discuss" are synonymous. Therefore, the General Counsel contends that Respondent was obligated to supply information about the subcontracting, to bargain about the decision to subcontract and its effects prior to making and implementing that decision.

Respondent takes the contrary position that, under the parties' collective-bargaining agreement, the decision to subcontract bargaining unit work is reserved exclusively to Respondent, and that while the Union has the right to certain procedures prior to the implementation of the decision, and the right to discuss the decision and its implications, it does not have the right to bargain about it. Respondent therefore contends that it had no duty to furnish the requested information, and that it did not violate the Act.

The General Counsel is correct that under Board law, the decision to subcontract bargaining unit work is a mandatory subject of bargaining. *Fibreboard Paper Products Corp. v. NLRB*, 379 U. S. 203 (1964). In his brief, the General Counsel concedes, as Respondent contends, that a union may waive its statutory right to bargain about a particular subject by contract, and correctly notes that the Board requires the party asserting the waiver to bear the burden of proof, and also requires that contract language asserted to waive such rights be "explicitly stated," and "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U. S. 693, 708 (1983).

The Board has recently held, in *Allison Corp.*, 330 NLRB 1363 (2000), that where the decision to subcontract is explicitly reserved to the employer by contractual agreement, there is no requirement that the employer bargain about a decision to subcontract. The language in that case which was found to be a '"clear and unmistakable waiver' of the union's right to bargain was as follows: The Company shall have the exclusive right to manage the business and operation of its facilities; . . . to subcontract; . . . and generally to control and direct the Company in all of its operations and affairs." The Board held that this language "plainly grants the Respondent the right 'to subcontract' without restriction." 330 NLRB at 1365.

More recently, *Allison Corp.* was followed in *California Pacific Medical Center*, 337 NLRB 910 (2002). The Board affirmed an administrative law judge's dismissal of a complaint against the respondent, despite differing legal analyses. The Board found it unnecessary to resolve the differing legal analyses because both resulted in a dismissal of the case. The con-

tract language found by the judge to constitute a waiver appeared in the section dealing with layoffs. There was no typical management rights clause in the contract, but in the section called "Staffing and Seniority," the collective-bargaining agreement stated that the employer "has the right to determine its staffing (including the number of jobs, the hours assigned to such jobs, and the changes to be made, if any)." Relying upon this language, the judge found that the employer had the right to reduce the number of jobs by layoffs. Further, he found that the employer had historically exercised the right to layoff employees without prior bargaining about the decision to do so. In *California Pacific*, the information requested by the Union in order to enable it to bargain over the decision was deemed not to be relevant, since there was no right to bargain about the decision.

The language in the instant case specifically states "The Employer reserves the right to enter into affiliation and merger agreements and to subcontract work normally performed by bargaining unit employees." In arguing that this language does *not* constitute a waiver of the Union's right to bargain about these decisions, the General Counsel relies on the succeeding language requiring at least 60 days' notice to the Union and Respondent's undertaking to "discuss" the decision for another 60-day period. In essence, as the General Counsel concedes, the nub of this argument is that the words "bargain" and "discuss" must be found to have the same meaning. Respondent argues that the words have different meanings, and in support of this position quotes examples from other portions of the contract where the parties use the word "negotiate" to describe a bargaining obligation, and the word "discuss" to describe talks which are not contemplated to involve "negotiations." Furthermore, Respondent argues, both the management rights section and Section 29 contain "zipper clause" language.

Both parties rely on two instances of subcontracting which occurred. One was the subcontracting of the work of transcribing medical records, and the second involved the work of histology technicians. While in one case the Union requested and received some information from Respondent, in neither case did the Union advance a proposal to retain the work within the bargaining unit. In both instances, Respondent behaved in conformity with its position that it had no obligation to bargain about the decision to subcontract, and the Union did not test this position by requesting any bargaining over the decision. Therefore the parties themselves have never tested the issue of whether the contractual words "bargain" and "discuss" have the same meaning, nor the issue of whether the Respondent's subcontracting decisions are subject to bargaining with the Union. I cannot find that this limited bargaining history has any usefulness in illuminating the parties' past practice with regard to section 15 of the collective-bargaining agreement. It supports neither the General Counsel's position nor Respondent's position.

Instead, I find that the language of the collective-bargaining agreement itself must be the determining factor. I find that the contract's reservation of the right to subcontract to Respondent is clear and unmistakable, as required by Board law. In fact, it is far clearer and more "unmistakable" than the waiver language in either *Allison Corp.* or *California Pacific*, supra. First, the management rights clause includes "subcontracting" as one of the rights reserved to the Employer. Second, the section dealing specifically with subcontracting reserves the right to subcontract bargaining unit work to the Employer. The ensuing language states only a procedural requirement that 60 days notice will be provided. It was provided here. The "Interpretive Statement" adds an additional period for discussion of any alternatives the Union can propose which would satisfy the Employer's reasons for considering subcontracting as set forth in its "parameters." In this case, the Employer did inform the union of its "parameters," to wit, to save money, and to relocate the work site, possibly even to employees' homes, while still saving money. After this discussion, the Employer remains free to make its decision to subcontract or not to subcontract, as stated clearly in the first sentence of the section.

I specifically decline to find the words "bargain" and "discuss" to be synonymous in this collective-bargaining agreement, as urged by the General Counsel. The only authority in support of this position cited by the General Counsel is the dictionary, not Board law. It is true that both words involve the activity of talking back and forth between at least two parties. As pointed out by Respondent, however, internal evidence in the contract points to the use of the word "negotiate" by the parties where bargaining was contemplated. The deliberate use of a different word in the subcontracting clause leads to the conclusion that a different kind of talking was contemplated by the parties in the subcontracting clause. I find that the language of section 15 to the effect that the parties will discuss alternative means of achieving the Employer's goals does not amount to a limitation on the Employer's clearly stated right to decide to subcontract work. Rather, it is simply a procedure to enable the Employer to gain the benefit of the Union's ideas if they are good ones, and to enable the Union to preserve the jobs of employees if the Employer accepts the Union's ideas. The fact that the discussion is defined in "interpretive" language rather than in the body of the subcontracting clause is a further indication that the parties did not contemplate actual bargaining over the decision, but a less formal interchange of ideas.

I find that Respondent fulfilled the procedural and discussion requirements spelled out in the parties' collective-bargaining agreement, and that it had no duty to bargain over the decision to subcontract the coders' work.

Both parties agree that Respondent had a duty to bargain over the effects of its decision to subcontract. It is clear from the record evidence that the Union never requested *effects* bargaining explicitly, as distinct from bargaining over the decision to subcontract. After the August announcement by Respondent that the decision to subcontract the coding work had been made, the Union did not request bargaining specifically on the subject of the effects of the subcontracting. Much of the information requested by the Union related to the decision to subcontract, and was intended, according to the testimony of Jeffries, to enable the Union to formulate an alternative proposal concerning the decision to subcontract. Apparently, since it did not have this information, the Union did not follow up separately on effects bargaining. Should the Union make such a request, Respondent would, of course, be obligated to bargain

over effects to the extent it has not done so. *Allison Corp.*, supra.

2. Information

The Board has held that subcontracting information like that requested by the Union is not presumptively relevant and therefore a union seeking such information must demonstrate its relevance. *Sunrise Health & Rehabilitation Center*, 332 NLRB 1304 (2000); *Associated Ready Mixed Concrete*, 318 NLRB 318 (1995), enfd. 108 F.3d 1182 (9th Cir. 1997). The finding made above that Respondent had no duty to bargain about the decision to subcontract means that the Union cannot demonstrate the relevance of the requested information. I find, therefore, that the Respondent's failure to provide all the requested information is not a violation of the Act. *California Pacific*, supra. Accord, *Detroit Edison Co.*, 314 NLRB 1273 (1994).

On the basis of the foregoing, I shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. April 7, 2004.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.